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June 22, 2018

A MESSAGE FROM DR. WESLEY SMITH, EXECUTIVE DIRECTOR



We anticipate the decision of the United States Supreme Court in the *Janus v. American Federation of State, County and Municipal Employees* (*Janus*) to be released next week. As you are aware, *Janus* challenges the constitutionality of requiring public employees to pay agency fees to an exclusive representative as a condition of employment.

In anticipation of the court's ruling, the California Legislature passed Senate Bill (SB) 866 this week as a budget trailer bill. This legislation addresses payroll deduction of dues, mass communications to employees and employee orientations and will become law as soon as the Governor signs the bill. The Court's ruling and SB 866 may create confusion for all public employers.

As you may recall from my previous email, in order to assist our members with timely information and guidance, ACSA is collaborating with the law firms of Atkinson, Andelson, Loyo, Ruud and Romo (AALRR), Fagen Friedman & Fulfroost LLP (F3) and Lozano Smith to monitor the case status and create resources to help address your questions and needs. To this end, we have prepared a FAQ to assist your organization with the initial questions that will arise from the *Janus* decision and SB 866.

ACSA will be updating this information as soon as the *Janus* decision is released. In the meantime, we hope this document will address a few urgent questions that we are hearing from our members, based on the assumption that the Court will rule that collecting mandatory agency fees from non-union members violates First Amendment rights and the implementation of SB 866.

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This information is intended to assist your organization with the initial question that will arise from the Janus decision and related legislation in California. As it is not legal advice, we recommend that you consult with legal counsel should you have additional questions.

FREQUENTLY ASKED QUESTIONS:

Q: Why haven't I heard about SB 866?

A: *SB 866 was amended at the last minute as a budget trailer bill allowing it to be fast-tracked through the legislature and to the Governor.*

Q: When does SB 866 take effect?

A: *Because SB 866 is a budget trailer bill, it will become law as soon as the Governor signs the bill.*

Q: Does the new legislation override the Janus decision?

A: *Janus is examining required union dues, while the legislation provides for employee written authorization to collect dues. Since the Court has not issued its Janus decision, we are unsure how the new legislation will be impacted.*

Q: Does SB 866 impact a public employer's ability to communicate with employees about the Janus decision?

A: *Yes. Any "mass communication" you send to your employees or applicants concerning their rights to join/support or refrain from joining/supporting their union requires a meet and confer process with the applicable union. If agreement cannot be reached on the contents of the communication, the employer may send out the mass communication but must also distribute at the same time the union's own mass communication to public employees.*

Any mass communication concerning the Janus decision will likely fall within this provision and requires the parties to attempt to craft a mutually agreeable content, or follow the alternate process of distributing two sets of mass communication: one from the employer and one from the union. Please keep in mind, this provision will have a significant impact on public employer mass communications beyond discussion of the Janus decision.

Q: What can/should/cannot we say to employees about Janus and SB 866?

A: *It is critically important that Board Members and administrators, as representatives of the school district, be aware of the limitations SB 866 places on communications regarding union participation and tailor any comments or responses to questions accordingly. If an employee asks you questions about the Janus case, the recent legislation, or whether to join or stay in the union, we strongly recommend that you refer them to their labor organization for answers to those questions. We also recommend that you be mindful of any comments that you may make that could be construed as deterring or discouraging union participation.*



Q: What about communication with the public?

A: Although SB 866 does not on its face refer to mass communications to the public, a public school employer should be wary of communications made to the public at a board meeting or on the district's website as these may still be construed as mass communications necessitating the meet and confer process since school districts know that employees attend board meetings and frequent the district's website. For these types of communications, the same mindfulness should be exercised as when communicating with employees about the Janus decision and related issues.

Q: Which employees does Janus cover?

A: Janus covers any and all public employees who were agency fee payers as of the decision's date. Agency fee payers are employees operating under an agency fee system and have chosen to opt out of the union. Through agency fees, these employees are required to pay the cost associated with collective bargaining, grievance processing, and contract administration, among other things. Agency fee payers cannot be compelled to pay for the political activities of the union. Under the anticipated ruling in Janus, agency fees would be unlawful.

Q: Does Janus trigger an obligation to negotiate?

A: No, in most cases. Most collective bargaining agreements contain a severability clause providing that if any provision of the agreement is unlawful it is essentially "severed" from the agreement, while the remaining provisions remain in full force and effect. Therefore, any language addressing agency fees in an agreement conflicting with Janus would be null and void, while the rest of the agreement would remain intact. However, districts and unions may have to meet and negotiate over the impacts of the Janus decision on other areas of collective bargaining agreements.

Q: What will the effect of Janus/SB 866 be on hiring, collective bargaining/due process?

A: Many of the effects of Janus at the bargaining table can only be speculated, however, it is anticipated that exclusive representatives will take steps to demonstrate their value to members by being more aggressive at the table, in grievance filing, in disciplinary proceedings, etc. As to hiring, SB 866 makes confidential the date, time and location of employee orientations, aside from notifying the employees attending the orientation, the exclusive representative, and vendors providing services at the orientation.

Q: How should I prepare my payroll department to handle dues deductions and requests to stop them?

A: Immediately alert your district's payroll and business teams about the case and legislation. Determine the implications on processing payroll in June and subsequent months. Establish internal protocols with regard to receipt and implementation of written notifications from union officials regarding initiation and cessation of union dues and agency/service fee deductions; including processing of any retroactive reimbursements. If necessary, consult with business services of your County Office of Education.



Q: When does payroll stop deductions when the decision comes out?

A: *In light of new legislation currently on the Governor's desk for signature, agency/service fee deductions for non-union members should continue until the applicable union notifies the district in writing that deductions may be discontinued, including identification of those employees for whom deductions should cease, and the timing/date they should be stopped. We will inform you immediately of any changes once the Janus decision is released.*

Q: What is the process if a union member notifies us that they would like to opt out of paying dues?

A: *Based on the language of SB 866, if an employee notifies the district of his/her desire to opt out of paying dues/discontinue membership in the union, district staff must refer the employee directly to the union in order to work out termination of union membership/agency fee deductions. The district cannot unilaterally implement such employee request. Confirm with union leaders to whom employees should be directed and how, and communicate the process to all payroll, business, and human resources department staff.*

Q: What impact does Janus have on agency/service fee provisions in our collective bargaining agreement(s)?

A: *Should the Court declare agency/service fee payments unconstitutional, those provisions in current collective bargaining agreements will be rendered null and void. SB 866 will trigger the obligation to meet and negotiate to address the impacts of the judicial decision (as well as the impacts of SB 866) on such provisions as well as other related issues within the mandatory scope of bargaining.*

Q: What impact does Janus have on "maintenance of membership" provisions in our collective bargaining agreement(s)?

A: *Depending on the particulars of your "maintenance of membership" provisions, Janus will likely invalidate these provisions. Specifically, if the Court rules that compelling agency fees or union dues is unconstitutional, maintenance of membership provisions that require non-union members to remit payment to a union would be unconstitutional. Your CBA probably includes a "severability" clause that maintains all valid provisions if one or more terms is declared invalid or unlawful.*

Q: If employees ask us questions whether they can opt out of their union and the effects of doing so (i.e., whether they are still covered by the CBA), what do we tell them/can we tell them?

A: *Districts may continue to answer questions from individual employees, including telling employees they have the right to join or not to join a union. When SB 866 is signed into law, the district must mutually agree with the unions about the contents and dissemination of any mass communications – a communication to multiple employees. If individual employees ask whether they are still covered by a CBA, the answer is yes. If an employee has completed an authorization for deduction of union dues and wishes to revoke that authorization, under SB 866 the district must direct them to their union. Districts should also be mindful of the prohibition against deterring or discouraging applicants for employment or employees from becoming or remaining union members.*



Q: If an employee does not pay dues, what level of representation are they entitled to?

A: *The level of representation afforded to non-paying employees will depend on the maintenance of membership provisions in a CBA to the extent those provisions remain in force after the Janus ruling. Some provisions provide for “reasonable costs” to be paid by an employee who is not a union member but who uses the grievance or arbitration provisions of a CBA. Districts and their unions may need to renegotiate these provisions in light of Janus.*

Q: If an employee does not pay dues, does the union contract apply to them?

A: *Yes, a CBA applies to all classifications that are part of a bargaining unit. If an employee’s classification is within the bargaining unit represented by a union, then the CBA applies to that employee.*

Q: Unions have expressed concerns about anti-union organizations attempting to contact members of their bargaining unit. What are our obligations if we are contacted by one of these organizations?

A: *If anti-union organizations ask the district to distribute any communications to employees, the district should proceed with caution. Districts must not - under existing law - deter or discourage applicants for employment or employees from becoming or remaining union members. Once SB 866 is signed by the Governor, a district must meet and confer with the union concerning the contents of any mass communication. Districts have no other obligations if contacted by an anti-union organization.*

Q: Does SB 866 impact union access to new employer orientations?

A: *Yes. Many districts have completed negotiating union access to new employee orientations as required by AB 119. SB 866 amends the law to prohibit the disclosure of the date, time, and place of the orientation to anyone other than the employees, exclusive representative, or a vendor that is contracted to provide a service for purposes of the orientation.*

Q: How do we comply with a Public Records Request for information on the employee orientation?

A: *Because SB 866 prohibits disclosure of the information, districts must redact the date, time, and place of the orientation from any public record request. It is advisable to keep a record of the response to such a request to demonstrate that this information was not disclosed. The prohibition on disclosure applies only to employers; nothing prevents employees themselves from publicizing this information.*

Q: What other steps do you recommend we take?

A: *Districts should review their CBAs, in particular maintenance of membership provisions. If these provisions are declared unconstitutional by the Court in Janus, districts should be prepared to negotiate new provisions that comply with the Court’s ruling and SB 866.*



ADDITIONAL REFERENCE POINTS AND INFORMATION DISTRICTS SHOULD CONSIDER COMPILING AS YOU NAVIGATE THE POST-JANUS LANDSCAPE ARE:

- » How many employees does the district have?
- » How many different union groups are in your district?
- » How many employees are in each group?
- » What are the average annual individual union dues?
- » How many employees in the district have already opted out of union membership and only pay agency fees?
- » Is income taxed before or after dues deduction?
- » Are pensionable (STRS/PERS) earnings calculated before or after union dues deductions?

LOOK FOR ADDITIONAL UPDATES TO COME FROM ACSA AND THE LEGAL ALLIANCE.

